United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2149

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATESOF AMERICA,

Plaintiff-Appellee,

-against-

STEVEN MALTESE,

Defendant-Appellant.

DOCKET NO. 75-2149

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

B
P/S

APPELLANT'S BRIEF

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(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or the court for the district in which it issued if it was issued by a United States magistrate.

18 U.S.C. 401

§ 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order,rule, decree or command.

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STATEMENT

This is an appeal from an order adjudging the appellants in contempt of Court under Rule 17(g) of the Federal Rules of Criminal Procedure, after a hearing before the Honorable Orrin G. Judd on November 18, 1975

Appellant Maltese was served with a subpoena on October 15, 1975 to appear as a witness in UNITED STATES OF AMERICA v. LARRY ALFANO, 75CR298, at 2:00 o'clock in the afternoon of October 15, 1975.

Appellant failed to appear in court pursuant to the subpoena because of illness. On November 18, 1975, the Government, by the Honorable David G. Trager, moved before the United States District Court for the Eastern District of New York (Judd, J.) for an order adjudging the

appellant to be in contempt of Court pursuant to Rule 17(g) of the Federal Rules of Criminal Procedure.

At the hearing on November 18, 1975 (Judd,J), the Government witness, the Assistant United States Attorney in the case of UNITED STATES v. LAWRENCE ALFANO 75CR298, testified that a subpoena was served upon appellant and that after appellant failed to appear pursuant to the subpoena, the witness had conversations with appellant's wife and doctor. In these conversations, the doctor expressed his opinion that appellant was ill and must remain in bed, although contradicted by two other doctors. Appellant's wife stated in these conversations that appellant had left his house one evening contrary to his doctor's orders.

The appellant's evidence consisted of testimony by his doctor that he advised appellant to remain in bed on October 15, 1975 because of illness.

Appellant's wife testified that when she told Mr. Cunningham that appellant had left the house, it was in fact untrue. She further stated that appellant had remained in bed following his doctor's orders, and that she had taken this action on her own, not by appellant's direction.

Appellant's seventeen-year-old daughter testified that she had seen appellant in his house in pajamas

and a bathrobe on October 15, 1975, in the evening and on October 16 and 17, 1975 before leaving for school and upon returning from school.

Appellant was adjudged to be in contempt of Court in violation of Rule 17(g).

Appellant Maltese was sentenced to ninety days (90) in custody and fined $1,000.00. Appellant was given not more than six (6) months to pay said fine.

Appellant was remanded. The fine was paid in full on November 21, 1975 as evidenced by receipt No. 019444.

On October 26, 1975 an application was made to the Honorable Orrin G. Judd for bail pending appeal. Bail was set at $2500 and the appellant is presently at liberty.

QUESTIONS PRESENTED

1. Was the evidence presented at the hearing on November 18, 1975 sufficient to find the appellant in contempt of Court?

2. Was it proper to sentence the defendant to a term of imprisonment and a fine?

3. If the sentence was improper, does payment of the fine fully satisfy the sentence, thereby making the jail sentence null and void, and unenforceable?

POINT ONE

The evidence at the hearing on November 18, 1975 was not sufficient to find the appellant to be in contempt of court.

The appellant was accused of criminal contempt of court. The purpose of the contempt power is to vindicate the power of the court when there is willful disobedience of a court order. (In re Osborn, 344 F.2d 611 [1965, 9th Cir.]) In order to find one guilty of a criminal contempt the Government must prove every element of the crime charged beyond a reasonable doubt. United States v. Goldfine 169 F.Supp. 93,98 (1958, D.C.Mass.) aff. 268 F.2d 941 (1959, C.A. 1st Cir.) cert. den. 363 U.S. 842(1960).

Rule 17(g) of the Federal Rules of Criminal Procedure states:

> (g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate.

Following United States v. Goldfine, (supra) the Government had the burden of proving that 1) a subpoena was issued requiring the appellant's presence in

court, 2) the subpoena was properly served upon the appellant 3) that the defendant failed to appear without an adequate excuse.

By stipulation at the hearing the parties agreed that the subpoena was delivered to appellant's wife with the knowledge of and the consent of the appellant.

The appellant's claim at the hearing was that he was ill on the date he was ordered to appear in court and he failed to appear because of his illness. The appellant's doctor testified that upon hearing of the symptoms experienced by the appellant, he advised appellant to go to Long Island Medical College Hospital for an examination. The appellant did go to the hospital for treatment as an out-patient. Appellant's own physician believed that hospitalization was needed but two other examining doctors disagreed and appellant was sent home with his doctor's advice to remain in bed.

Upon this information, the appellant had a good faith belief that he was too ill to appear in court pursuant to the subpoena served upon him and that such an appearance might further impair his health.

The Second Circuit Court of Appeals held in United States v. Thompson 319 F.2d 665 (1963) that the question in such a situation is not a medical one but

whether the non-compliance with the subpoena was in bad faith and in contumacious disregard of the authority of the court. See also United States v. Bryan 339 U.S. 323, 332, 70 S.Ct. 724 (1950).

The court stated at page 671 that the true issue in such a case is whether appellant;

> "actually belived that compliance with the subpoena would create a risk of harm to him or whether the physicians' examinations and certificate... were part of a scheme engineered by appellant to evade the order of the court "

The Government did not offer any evidence that appellant was not ill except that two doctors at the Long Island Medical College Hospital did not believe appellant's illness to require hospitalization and the call by appellant's wife that appellant had left his house.

Testimony given by appellant's wife and seventeen-year-old daughter indicate that the defendant did remain confined to bed during the remainder of the time in question. Appellant's wife stated that although she had told the Government's attorney that appellant had left the house, in fact, appellant was at home and she further stated that she had acted on her own initiative. This does not appear to be a scheme by appellant to evade the order of the court.

The evidence further indicates that appellant

made a good faith effort to notify the court that he would not be able to appear in court on the day required. Appellant's wife called the Government's attorney to notify him of appellant's illness.

Upon all the evidence at the hearing the finding that the defendant was in violation of Rule 17(g) of the Federal Rules of Criminal Procedure should be reversed because the Government failed to prove beyond a reasonable doubt that appellant did not have an adequate excuse not to obey the subpoena.

POINT TWO

The District Court's sentence of a One Thousand Dollar fine and a ninety day period of incarceration was improper.

The appellant was found guilty of contempt of court under Rule 17(g) of the Federal Rules of Criminal Procedure. 18 U.S.C. 401 is the basis for the general power to punish for criminal contempt Bloom v. Illinois 391 U.S. 194 , 203, 204, 88 S.Ct. 1477, 1483 (1968) and this section provides the sentences which may be imposed for such a violation.

Section 401 states:

§ 401. Power of court

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other as,,,
>
> (3) Disobedience or resistance to its lawful writ, process, order rule, decree, or command.

This section clearly states that a fine or imprisonment may be imposed but not both. In re Bradley 318 U.S. 50,51, 63 S.Ct. 470, In re Osborne 344 F.2d 611, 616(1965 9th Cir.) United States v. DeSimone 267 F.2d 741 (1959 2nd Cir.) Phillips v. United States 457 F.2d 1313 (1972, 8th Cir.)

In United States v. DeSimone (supra), the defendant was charged with failing to respond to a Federal Grand Jury subpoena. The issue was whether the defendant was entitled to a trial by jury. The court stated at Page 744:

> But the fact remains that the failure to respond to a Federal Grand Jury subpoena does not independently constitute an offense under any act of Congress; nor is it a violation of any statute of New York or California to which our attention has been called. The failure to respond to a Grand Jury subpoena is therefore to be tried without a jury, as a criminal contempt under 18 U.S.C. § 401(3)

Similarly, failure to respond to a subpoena to appear as a witness in a trial does not constitute an independent offesne under New York or Federal law. Therefore, the sentence for this contempt should be found in 18 U.S.C. 401.

18 U.S.C. 402 provides sentences which may be imposed for contempts which are crimes. Since the failure to appear as a witness pursuant to a subpoena is not a crime independent of the contempt it is not subject to the penalties which may be imposed under this section.

Therefore, the sentence must be under 18 U.S.C. 401 and may be a fine or imprisonment, but not both.

POINT THREE

Payment of the $1,000 fine is in full satisfaction of a proper sentence and the term of incarceration imposed should be vacated.

On November 21, 1975 appellant paid in full the fine imposed upon him in the District Court (Judd,J) and obtained a receipt as evidence of said payment. The trial court could only have imposed a fine or prison sentence.

In Re Bradley 318 U.S. 50, 63 S.Ct. 470 (1943) was a case where the petitioner was fined and sentenced to jail. The peitioner paid the fine. Then the court realized the sentence was in error and amended the sentence to omit the fine and retain only six months' imprisonment. The court clerk offered to return the money paid in satisfaction of the fine but the petitioner in that case refused to accept the refund.

The Supreme Court held at Page 52 that when the fine was paid to the clerk and was receipted

> ..."the petitioner had complied with a portion of the sentence which could lawfully have been imposed. As the judgment of the court was thus executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court was at an end."

(citing Ex Parte Lange, 18 Wall. 163, 176,21 L.Ed. 872.)

The court went on to hold at Page 52; that "...(s)ince one valid alternative provision of the original sentence has been satisfied, the petitioner is entitled to be freed of further restraint."

As a result of this decision, the petitioner was discharged from custody and payment of the fine was deemed full satisfaction of the sentence.

In this case, appellant was sentenced to a fine and prison sentence. He paid the fine in full satisfaction of one of the alternative penalties which could properly have been imposed under law. Therefore, under the holding in In Re Bradley (supra) the sentence may not be amended and has been fully satisfied, relieving appellant of that portion requiring imprisonment.

CONCLUSION

The judgment of conviction should be reversed or in the alternative, the prison sentence should be vacated.

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